Los Angeles Local, American Federation of Television and Radio Artists *and* Eleven-Fifty Corporation and Pacific and Southern Company, Inc. Case 31–CB–8548

April 8, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On September 30, 1992, Administrative Law Judge Gordon J. Myatt issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Los Angeles Local, American Federation of Television and Radio Artists, Los Angeles, California, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(b).

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to execute the Dees side letter agreed to with KIIS AM/FM and tendered to us on April 19, 1991.

WE WILL, on request, execute forthwith the Dees side letter agreement.

LOS ANGELES LOCAL, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

Margaret Hume, Esq., for the General Counsel.
Hirsch Adell, Esq., of Los Angeles, California, for the Respondent.
Wendell J. Van Lare, Esq., of Arlington, Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge. On a charge filed by Eleven-Fifty Corporation and Pacific and Southern Company, Inc. (the Employer) against Los Angeles Local, American Federation of Television and Radio Artists (the Union) the Acting Regional Director for Region 31 issued a complaint and notice of hearing on July 3, 1991.[1] The substantive allegations of the complaint allege the Employer and the Union, parties to successive collective-bargaining agreements since 1979, engaged in negotiations for a new agreement and reached a full and complete understanding concerning the terms of that agreement. Further, that since April 1991, the Union has refused to execute fully all of the agreed-on provisions to be incorporated in the agreement. This refusal on the part of the Union is alleged to be a violation of Section 8(b)(3) and (d) of the National Labor Relations Act (the Act). The Union's answer admitted certain allegations of the complaint, denied others, and specifically denied violating the Act.

A hearing was held in this matter on October 1, 1991, in Los Angeles, California. All parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issues. Briefs have been submitted by the parties and have been duly considered.

On the entire record in this matter, I make the following

FINDINGS OF FACT

I. JURISDICTION

Eleven-Fifty Corporation is a Delaware corporation with an office and place of business located in Los Angeles, California. Eleven-Fifty owns and operates radio stations, and Station KIIS AM/FM (KIIS) in the Los Angeles area is the only facility involved in this matter. In the course and conduct of its business operations, Eleven-Fifty annually sells services valued in excess of $5000 to customers within the State of California, who in turn provide or receive goods or services, valued in excess of $50,000, directly to or from parties located outside the State of California. Eleven-Fifty annually derives gross revenues in excess of $100,000 from

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In the absence of the finding of a specific violation of Sec. 8(b)(1)(A) here, we shall modify the judge's Order by deleting par. 1(b) which contains general cease-and-desist language. See *National Maritime Union*, 78 NLRB 971 (1948), enfd. 175 F.2d 686 (2d Cir. 1949), cert. denied 338 U.S. 954 (1950).

[1] All dates refer to the year 1991 unless otherwise indicated.

its business operations. Accordingly, Eleven-Fifty is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent, Los Angeles Local, American Federation of Television and Radio Artists, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Since 1979, the Union and KIIS have been parties to successive collective-bargaining agreements covering a unit of KIIS' ''on-the-air'' employees; i.e., staff announcers and freelance performers. The latest agreement between the parties, prior to the events involved here, was effective for the period May 1, 1987, to April 30, 1990. The undisputed testimony indicates that some of the on-the-air employees negotiate personal services contracts with KIIS and these agreements provide compensation well in excess of the scale contained in the collective-bargaining agreement. Once such personal service agreement is between the Employer and Dees Creations, Inc. (Dees Creations). (See R. Exh. 2.) Under this contract, Dees Creations produces radio shows employing the talents of Rick Dees, and these shows are broadcast over KIIS AM and FM during the morning drive-time hours. In addition to Dees, who is the drive-time personality, Dees Creations also employs other persons, including those who provide comic voices and sound effects that are a part of the Rick Dees show. The essential artistic control over the show is maintained by Dees Creations. The remuneration paid Dees Creations under this agreement is many times more than the scale contained in the union agreement.[2] Additionally, the record indicates that the relationship between KIIS and Dees Creations has been carried on without any involvement by the Union.

Although Rick Dees is the morning drive-time personality for the radio station, KIIS does not have a contractual relationship with him as an individual. Rather, it is with Dees Creations, which employs Dees. Initially under the contact with Dees Creations, KIIS did not make health and retirement contributions to the Union for Dees. In 1983, the Union filed a grievance seeking such contributions and it appears that the grievance was informally resolved by KIIS agreeing to commence making these contributions, based on the Union's minimum scale, on behalf of Dees.[3]

Sometime in 1990, before the parties began negotiations for a successor agreement to the latest expired contract, the trustees of the Union's health and retirement plan filed an ERISA lawsuit against KIIS alleging the employer was deficient in the contributions to the plan on behalf of Dees. The trustees asserted that the contributions since 1983 should have been based on Dees' total compensation rather than the minimum contract scale. It was while the lawsuit was pending that the parties began negotiations for a new agreement.

[2] Dees Creations, Inc. is owned and controlled by Rick Dees.

[3] This arrangement apparently continued for a number of years thereafter, despite the fact that the collective-bargaining agreement required such contributions to be based on the total compensation of the unit employees.

B. *The Negotiations for a Successor Agreement*

There were two bargaining sessions between the Union and KIIS in 1990. The first occurred on April 26 and the second was held on June 7. Wendell Van Lare was the chief spokesperson for the Employer and Harry Buhler was the chief negotiator for the Union.[4] The undisputed evidence discloses that very little was accomplished by way of substantive negotiations as the discussions of the union and management representatives centered mainly on the pending lawsuit. (R. Exhs. 5 and 6.)

The parties resumed face-to-face negotiations on January 16, 1991, and concluded them on January 17. Although the testimony of the Employer and union witnesses are in agreement in many respects, there is material disparity concerning whether Dees was to be included in the bargaining unit and whether the union representatives negotiated a binding agreement. The January 16 negotiations were held in the offices of KIIS. Van Lare was accompanied by two other management officials of KIIS, Jay Cook and Bill Richards. Cook was the president of Gannett Radio Division and general manager of KIIS. Richards was the program director for Gannett Radio Division. Buhler was assisted by Sylvia Gonzalez, who was a business representative for the Union with considerable experience in negotiations.

Van Lare testified the parties used the proposals submitted by the Employer in April of the prior year as the basis of their negotiations. As the parties arrived at agreement on various items or made additions, he marked his copy with the notation, ''TOK'' (to indicate tentative approval), or made cryptic notes on the sheets. (See G.C. Exh. 2.)[5] According to Van Lare, the parties made considerable progress during the session, which lasted approximately 2 hours.

It is undisputed that the parties agreed to prospectively replace the Union's health insurance plan with the Employer's health insurance plan. The record shows they also agreed to prospectively remove the unit employees from the Union's retirement plan and place them in the Employer's pension plan. Van Lare stated that the parties discussed excluding Dees from the bargaining unit at this point because of the impact Dees' large salary would have on the Employer's pension plan. In expressing the basis for his insisting that Dees be excluded from the bargaining unit, Van Lare testified that:

> [He] was very conscious of having a specific clause that excluded Mr. Dees from the bargaining unit because, candidly, because of the enormous amount of money that Mr. Dees makes under his contract, the Dees Creations, Inc., contract. [He] didn't want any, any conceivable way that Mr. Dees would be covered by a Gannett pension plan. It would be a plan buster, potentially, because of the magnitude of his compensation.

[4] Van Lare was the director of labor relations for the Gannett Company, the Employer's parent company. Buhler was the director of staff contracts and administration for the Union. Both were experienced negotiators. Van Lare had been negotiating collective-bargaining agreements on behalf of management for 18 years and occupied his present position for the past 10 years. Buhler had been negotiating contracts on behalf of unions for approximately 15 years.

[5] Gonzalez took notes of the January bargaining sessions for the Union. They are contained in the record as R. Exhs. 7 and 8.

Van Lare further stated it was for this reason that he and Buhler agreed that the ''sensible'' way to place the unit employees under the Employer's pension plan ''would be to memorialize the understanding that Dees was not in the unit, prospectively.'' According to Van Lare, the outcome of the pending lawsuit would resolve the issue for the time period covered by that litigation, and the exclusion of Dees from the unit would permit the parties to deal with the issue ''prospectively'' at the bargaining table.[6] Van Lare testified that Buhler said it did not matter whether Dees was a member of the KIIS bargaining unit or not, since Dees was involved in other radio and TV activities and programs (other than KIIS), which made Dees a union member.

Cook, who testified he was present throughout the meetings in January, recalled that he participated in the discussion surrounding Dees. According to Cook, the uniqueness of Dees in the industry was pointed out, and also the fact that Dees was involved in other kinds of broadcast work which made him a member of the Union. Because of this, Cook stated it was agreed that Dees being a member of the KIIS bargaining unit was not an important issue.

Van Lare testified that after the agreement on the nonunit status of Dees, the parties further agreed that he would clear the matter with Dees because the latter was important to the station, and it was necessary that Dees be ''comfortable'' with the arrangement. He also informed the union representatives that he would communicate with the Employer's ERISA attorneys and its compensation expert regarding the changes in the health and pension benefits.

According to the testimony of Van Lare, the exclusion of Dees from the bargaining unit was to be accomplished by a ''side letter'' executed by the parties.[7] In addition to the arrangement regarding Dees, the parties negotiated the deletion of an arrangement contained in an existing side letter known as the ''McKinney'' side letter, and for the execution of a new side letter involving arrangements for the use of a ''Swing Person.'' Van Lare stated that the session ended with the understanding that the parties would return the following day when he would present a draft of their understanding, after each side had an opportunity to check with their respective offices.

Contrary to the testimony of Van Lare and Cook, the witnesses for the Union deny that the parties agreed to exclude Dees from the bargaining unit. Gonzalez, who took the notes for the Union, testified that Van Lare talked ''incessantly'' about the Employer not wanting any more lawsuits regarding the Union's health and retirement fund. She stated that Van Lare said the Employer wanted a provision in the contract which would provide that the contract with Dees Creations was not in violation of the collective-bargaining agreement with the Union. According to the testimony of Gonzalez, Buhler responded by stating the parties could execute a side letter to that effect, but that Dees was a member of the Union. Gonzalez denied that Van Lare requested that Dees be excluded from the bargaining unit or that the Union acknowledge that he was not a member of the bargaining unit.[8] To the contrary, Gonzalez stated Buhler made it clear that Dees was a member of the Union. When called as a witness, Buhler also denied that he agreed Dees would be excluded from the bargaining unit.

The negotiations resumed the following morning in the offices of KIIS. The parties were represented by the same individuals, although Richards was in and out of the meeting because of news that was breaking on the start of the Persian Gulf War.

According to the testimony of Van Lare, he presented the union representatives with copies of a final proposal dealing with the main body of the contract (G.C. Exh. 3) and two side letters. One side letter dealt with the arrangement regarding Dees (G.C. Exh. 4) and the other contained the arrangement for the use of a swing person (G.C. Exh. 5). The Dees side letter stated as follows:

> It is understood and agreed between the Company and AFTRA [the Union] that the Company has and may continue to contract with Dees Creations, Inc. to provide 6AM-10AM programming on KIIS AM/FM featuring Rick Dees. Said contract and the performance of Rick Dees thereunder are not covered by any of the provisions of the collective bargaining agreement, and in no way violate the collective bargaining agreement.

Van Lare further testified that he went through each item of the final proposal with the union representatives, and then Buhler asked for time to caucus with Gonzalez. He stated the management representatives left the room while Buhler and Gonzalez conferred for approximately 15 minutes. According to Van Lare, when the management representatives returned to the conference room, Buhler stated the documents ''looked good'' and that the parties ''had a deal.'' Van Lare marked his copies of the contract proposals and the two side letters with the notation ''TOK, 10:45 a.m., 1/17/91'' (G.C. Exhs. 3, 4, and 5), and Gonzalez recorded ''Final Agreement reached 10:45'' in her notes (R. Exh. 8). Van Lare asked Buhler about the ratification process and the latter responded that the bargaining unit members would have to ratify the agreement. Buhler indicated he expected a ratification vote by the end of January and he would notify Van Lare when it was accomplished. It was also agreed that Van Lare would draft the new agreement for execution, incorporating the changes agreed on and the side letters.

Although the union representatives acknowledge an agreement was reached on January 17, they disagree with the testimony of the Employer's witnesses as what was agreed on. Buhler on cross-examination admitted that at the inception of the meeting Van Lare presented him with the contract items discussed the prior day, as well as the two side letters. According to Buhler, after going over the items to be embodied in the contract, he merely glanced at the Dees side letter. He stated he was scheduled to fly out of town that afternoon to attend several meetings and then start a vacation in Florida. Thus, according to Buhler, he hurriedly glanced at the side letter and ''it appeared to say exactly what [he and Van Lare] had been talking about.'' Buhler further testified that

[6] Despite the concern about the adverse impact that would result if Dees were covered under the Employer's pension plan, Van Lare testified he was not making the exclusion of Dees a bargaining demand of the Employer.

[7] Apparently it was a longstanding practice of the parties to handle certain contractual arrangements by means of side letters. When executed, the side letters were incorporated into and became a part of the total collective-bargaining agreement.

[8] The notes taken by Gonzalez do not reflect a request by Van Lare to exclude Dees from the unit. R. Exh. 7.

during the caucus, Dees passed by the conference room where the union representatives were sitting and they spoke with him. They informed Dees that the Employer proposed to remove the unit employees from the Union's health and retirement plan and asked if he had a problem with that. Dees indicated he did not. Buhler denied they mentioned to Dees that he would also be removed from the bargaining unit. Buhler acknowledged that the side letter was on the table at the time he and Gonzalez spoke with Dees.

Contrary to Buhler, however, Gonzalez stated on direct examination that Van Lare did not present the Dees side letter until after the union officials had caucused. Thus, according to Gonzalez, the union representatives did not have the language of the side letter when they spoke to Dees during the caucus. She stated it was not until the negotiations resumed that Van Lare gave the side letter to Buhler, who glanced at it and said the parties had a deal.[9] Gonzalez further testified that during the negotiations, Buhler only agreed that the Dees side letter would contain language indicating the contract with Dees Creations did not violate the collective-bargaining agreement.

C. *The Events Following January 17, 1991*

On January 31, Van Lare sent a draft of the final agreement to the Union stating, the Employer was pleased that the Union was recommending ratification by the unit members. (G.C. Exh. 6.) At approximately the same time, the union representative discovered that the parties had neglected to make provisions for coverage of part-time employees in the change over to the Employer's health and pension plan. This was brought to Van Lare's attention by the union representatives, and he agreed to include the part-time employees in the contract language. Gonzalez also submitted proposed changes in the language placing the unit employees under the Employer's health and pension plans (R. Exh. 9), but these changes were rejected by Van Lare. Additionally, the union representatives discovered sometime in February that the circumstances underlying the McKinney side letter, which the parties had agreed to delete, continued to exist. They notified Van Lare and he agreed to restore the McKinney side letter and add it to the other two side letters the parties agreed on on January 17.

In early February, Buhler notified Van Lare that the unit employees had ratified the proposed terms of the agreement between the Employer and the Union. On February 28, Van Lare sent a corrected version of the contract to the parties along with the three side letters. This version apparently contained several typographical errors and some misspelling, which was brought to Van Lare's attention for correction. On March 29, Van Lare sent a final corrected copy of the collective-bargaining agreement to the Union for execution. (G.C. Exh. 11.)

Van Lare testified he was contacted by Buhler on April 12 about the Dees side letter. According to Van Lare, Buhler stated his ''bosses in New York'' felt the Dees side letter would have implications beyond the Los Angeles station, and they did not want him to execute it. Buhler told Van Lare that he (Buhler) had some problems and could lose his job over (the Dees side letter). Van Lare took the position that the parties had an agreement on the side letter but, nevertheless, asked Buhler to send him some language for consideration. When the Union's modification was received, Van Lare rejected it.

Buhler did not testify concerning his conversation with Van Lare in April regarding the Dees side letter. Rather, he stated that after receipt of the contract documents, ''it dawned on him'' that the language of the Dees side letter could be construed as removing Dees from the bargaining unit. Gonzalez testified the union negotiators could only arrive at a tentative agreement with the Employer. She stated that approval required ratification first by the unit employees and then final approval by the board of directors of the Local. Both Buhler and Gonzalez admitted they never advised Van Lare that approval by the local board of directors was necessary when he inquired about the ratification process at the conclusion of the meeting on January 17. Gonzalez further testified that the agreement would never have been approved if the union representatives had agreed to remove Dees from the bargaining unit.

On April 19, Van Lare sent a letter by facsimile to Buhler demanding that the Union execute the contract and the side letters. (G.C. Exh. 12.)[10] The Union responded on May 2 by forwarding executed copies of the contract and the McKinney and swing person side letters to the Employer. The Union refused to sign the Dees side letter asserting it did not reflect the discussion of the parties on the subject. (G.C. Exh. 13.) The undisputed testimony indicates the signed documents returned to the Employer were executed by the executive director of the International Union, whose offices were in New York City.

Concluding Findings

I.

The General Counsel and the Employer basically contend that the parties had reached a final and binding agreement on the substantive terms of the contract and the side letters on January 17, and the only condition to be fulfilled prior to the execution of the total contract was ratification by the bargaining unit members. Since this condition was satisfied in early February, they argue that the Union was obligated under the Act to execute the documents embodying their agreement once they were completed and submitted by the Employer.

The Union's defense includes numerous contentions, both factual and legal, which in essence fall in the following categories: (1) the Employer did not propose removing Dees from the bargaining unit during the face-to-face bargaining sessions in January, (2) there was no meeting of the minds on January 17 and, therefore, the parties never reached a binding agreement, (3) the union representatives only possessed authority to negotiate a tentative agreement subject to

[9] On cross-examination, Gonzalez admitted that the union representatives had been given the Dees side letter prior to the 15-minute caucus. She also admitted they read the document during the caucus. However, Gonzalez on redirect examination reiterated her statement that the Dees side letter was not given to the union representatives until after the caucus.

[10] In the letter demanding execution of the contract and the side letters, Van Lare inadvertently referred to two side letters rather than the three side letters which the record discloses were involved in the negotiations.

ratification by the unit and approval by the Union's board of directors, (4) the agreement on the Dees side letter, if reached, constituted a unilateral mistake of which the Employer was, or had reason to be, aware and, thus, should be rescinded.

II.

Critical to any legal conclusions to be drawn from the events here is the resolution of the conflicting testimony between the parties regarding the agreement, or lack thereof, on the Dees side letter. In my judgment, the testimony and record evidence weighs heavily in favor of a finding that the parties agreed to remove Dees from the bargaining unit, and the side letter reflected this agreement.

First, it is evident that while both sides were in agreement to place the unit employees in the Employer's health and pension plans, they were equally aware of the trustees' pending lawsuit involving Dees and its impact on the agreement to change the prospective coverage for the unit. This lends credence to the testimony of Van Lare that he proposed Dees be excluded from the unit and they mutually agreed this was the ''sensible way'' to resolve the problem. Since Dees remained a member of the Union by virtue of his other radio and TV activities, removal of Dees from the KIIS unit had no impact on his union membership. Nor is this conclusion entirely ruled out by the notes taken by Gonzalez. She indicated Buhler's position was that ''Dees is AFTRA member'' during the discussion regarding the personal service contract with Dees Creation. Also that Buhler took the position that the terms and conditions of that contract were controlling and did not violate the collective-bargaining agreement. This notation is equally as consistent with the testimony Van Lare and Cook that Buhler indicated it did not matter whether Dees was a member of the KIIS unit because he remained a union member due to his other activities as it is with the testimony of the union representatives that Buhler stated Dees was a member of the Union.

But of even greater weight in ascertaining which of the conflicting versions of what was agreed on concerning the Dees side letter is the conflict in the testimony of the union representatives about the events. While Buhler merely testified that he did not agree to exclude Dees from the KIIS unit, Gonzalez not only supported this position but also stated that Van Lare did not make a proposal to exclude Dees from the unit. It is difficult to discern a purpose for Buhler taking the position that Dees was a member of the Union—a fact which was never in question—unless it was in response to the question of whether his exclusion from the KIIS unit would affect his membership status. This, however, is not the only inconsistency in the testimony of the union witnesses which directly bears on the reliability of their statements. Buhler acknowledged that on January 17, Van Lare presented the union representatives with a draft of the Dees and swing person side letters along with the substantive contract items agreed on *prior* to their request for a caucus and their discussion with Dees. Gonzalez, on the other hand, stated on direct examination that the Dees side letter was not presented to the Union until *after* the union caucus, and then on cross-examination admitted the side letter was given to Buhler *before* the caucus. On redirect, Gonzalez inexplicably adopted her prior position, without appearing to be confused or offering an explanation for her conflicting statements.

Thus, on the basis of my observation of all the witnesses and because of the inherent inconsistencies in the testimony of the union witnesses, I find the testimony of Van Lare and Cook to be more credible and trustworthy than that of Buhler and Gonzalez. In my judgement, the union witnesses appeared to be crafting their testimony to support their position that they had not agreed to exclude Dees from the KIIS unit rather giving an accurate account of the events that occurred. Accordingly, I find that the parties did in fact agree to exclude Dees from the KIIS unit, since the exclusion would not affect his status as a union member. I further find that the Dees side letter presented to the Union on January 17 did set forth the agreed-on arrangement of the parties.

III.

Having concluded the parties reached an agreement on the Dees side letter on January 17, there remain the questions of (1) whether there was a sufficient meeting of the minds so as to require the parties to embody the terms in executed documents, (2) if there was a meeting of the minds, whether the agreement and the side letters were contingent on final approval by the executive board of the Union to become binding and/or operative, and (3) whether the Dees side letter, if considered an agreement between the parties, should be rescinded as a unilateral mistake which was known to the Employer at the time of agreement.

A.

Regarding the issue of the meeting of the minds, I find that the record evidence and the credited testimony warrants the conclusion that the parties reached agreement on the contract items on January 17. The record discloses that they went over the substantive items agreed on for inclusion in the collective-bargaining agreement and that the side letters were given to the union representatives, who had an opportunity to review and caucus about them before indicating their acceptance. As reflected in Gonzalez' notes (final agreement reached 10:45) and Buhler's statement ''We have a deal,'' the union negotiators unreservedly accepted the Employer's presentation of the items to which the parties agreed during the negotiations. Nor was there any indication by the union representatives, at the time of their acceptance, that they did not possess authority to finalize an agreement with the Employer, other than the condition of ratification by the unit members.

The Union contends there was never a meeting of the minds on the terms of the complete agreement because the parties subsequently engaged in negotiations concerning substantive items of the contract. I find the record does not support this argument. It is undisputed that subsequent to the approval of the contract items on January 17, the Union notified the Employer that they had neglected to include the part-time employees in the transfer to the Employer's health and pension plans. Since the parties had negotiated to prospectively place the unit employees in the Employer's plans and the part-time employees were part of the covered unit, I find this to be nothing more than a clarification of the item to remedy an obvious omission in that section of the contract. This was not a substantive change in the agreement but, rather, merely a modification which comported with the terms previously negotiated by the parties in January. *Granite State*

Distributors, 266 NLRB 457 (1983); *Midvalley Steel Fabricators*, 243 NLRB 516 (1979).

Similarly, when the Employer rejected the Union's request to change the language of the provisions placing the unit employees under the Employer's plans, this likewise did not rise to the level of substantive negotiations which would indicate the parties had not reach a meeting of the minds on the contract terms in January. Indeed, at this point the Employer was under no duty to entertain any modifications of the terms already agreed on, and the mere fact that it did so and rejected them, is not the equivalent of engaging in further negotiations. *Granite State Distributors*, supra.

Finally, the McKinney side letter also relates to a topic the parties negotiated to agreement during the January sessions. Initially, the parties agreed to delete it because they mutually felt the circumstances underlying the arrangement no longer existed. When the Union determined in February that those circumstances continued to exist and so notified the Employer, the parties agreed to include the side letter in their total contract. This, like the situation of the part-time employees, is nothing more than a clarification of an agreed-on contract item whereby the parties were correcting a mutual mistake. It is evident that this action the parties were not engaging in further negotiations, but were simply clarifying a provision of the agreement in order to make the final contract conform with the results of their January negotiations.

B.

The further contention that the terms of the total contract, if agreed to during the negotiations, did not become final and binding until approved by the Union's executive board must also be rejected. The record clearly establishes that the only contingency placed on the approval of the agreement by the union negotiators was that the agreed-on terms had to be ratified by the unit members. At no time during the negotiations did the union representatives inform the employer representatives of the requirement of the executive board approval. In these circumstances, it is apparent that Buhler had the authority to make a binding agreement with the Employer that was subject only to the contingency of unit ratification. Since the unit employees ratified the terms of the agreement in early February and Buhler notified the Employer that this had been done, a binding agreement between the parties came into existence. *Plattdeutche Park Restaurant*, 296 NLRB 133 (1989); *Induction Services*, 292 NLRB 863 (1989); *Ben Franklin National Bank*, 278 NLRB 986 (1986). Cf. *Felbro, Inc*., 274 NLRB 1268 (1985).

C.

The final argument advanced by the Union is that the Dees side letter was the result of a unilateral mistake on the part of the union negotiators of which the employer representatives were aware or had reason to be aware. I find this argument to be without merit and contrary to the facts found in this case.

The factual underpinnings for the Union's position appears to be (1) that Van Lare never made the proposal to exclude Dees from the unit to the union representatives on January 16, (2) that Van Lare did not submit the language of the Dees side letter until after the union representatives caucused on January 17, and they gave their approval after hurriedly glancing at the document without a full understanding of its contents, and (3) that Van Lare was aware, or should have been aware, that the Union would never approve the exclusion of Dees from the unit because of the pending lawsuit involving the pension contributions for Dees.

Having found, contrary to the Union's contention, that the parties did in fact discuss and agree on the exclusion of Dees from the KIIS unit, and having also found that the language of the Dees side letter reflected their agreement and was presented to the Union at the beginning of the meeting on January 17, it is apparent that the position of the Union is not supported by the record evidence. As previously noted, the parties were in agreement on placing the unit employees in the Employer's health and pension plans but the magnitude of Dees' compensation presented a barrier to accomplishing this, if he remained a member of the unit. Because Dees was a major personality in the field, his union membership was as important to the Union as his performance was to the Employer. Therefore, it is evident the parties arrived at a solution, based on Dees' other activities, which precluded Dees' participation in the Employer plans without jeopardizing his union membership. In addition, I do not credit the testimony of Buhler that subsequently ''it dawned on him'' that the language could be interpreted as excluding Dees from the unit. Rather, I credit Van Lare's unrefuted testimony that Buhler called him on April 12 and stated ''his bosses in New York'' felt the Dees side letter had implications beyond the Employer's station in Los Angeles, and they did not want him to execute it.

In these circumstances, it can hardly be said that the Dees agreement was the result of misrepresentations by the Employer or that the union representatives were unaware of the import of the agreement at the time it was made. Nor can it be said that the Employer knew, or should have known, the union representatives were making a material mistake in agreeing to the proposal. *Monterey/Santa Cruz Building Trades Council (National Refractories)*, 299 NLRB 251 (1990); *Hospital Employees Local 1199 (Lenox Hill Hospital)*, 296 NLRB 322 (1989); *Grey Eagle Distributors*, 296 NLRB 361 (1989). As the Board stated in *Apache Powder Co*., 223 NLRB 191 (1976), ''rescission for unilateral mistake is, for obvious reasons, a carefully guarded remedy reserved for those instances where the mistake is so obvious as to put the other party on notice of an error.'' It is clear that the record here does not demonstrate that such an obvious mistake occurred, and the agreement on the Dees side letter remains binding on the parties.

IV.

On the basis of the above, I find the parties entered into an agreement on the terms of the contract and the side letters on January 17, 1991. I further find this agreement became binding on the parties in early February on the satisfaction of the condition of ratification by the unit employees. It is settled law that when an employer and a union have reached agreement on terms and conditions of employment, it is unlawful for one of the parties to refuse to sign a contract embodying the terms of that agreement. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 526 (1941); *Teamsters Local 251 (McLaughlin & Moran)*, 299 NLRB 30 (1990); *Hospital Employees Local 1199*, supra. Accordingly, I find the Union was obligated to sign the agreement embodying the Dees

side letter on request by the Employer and the refusal to do so violated Section 8(b)(3) and (d) of the Act.

CONCLUSIONS OF LAW

1. Eleven-Fifty Corporation and Pacific and Southern Company, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Los Angeles Local, American Federation of Television and Radio Artists is a labor organization within the meaning of Section 2(5) of Act.

3. The employees of the Employer described in article I of the 1987–1990 AFTRA/KIIS AM and FM contract for staff announcers and schedule for freelance performers constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since 1979, the Union has been the exclusive collective-bargaining representative of the unit employees and has been recognized as such by the Employer in successive collective-bargaining agreements, the most recent of which was effective by its terms for the period May 1, 1987, to April 30, 1990.

5. By refusing, since May 2, 1991, to execute the Dees side letter agreement reached with the Employer, the Union has violated Section 8(b)(3) and (d) of the Act.

THE REMEDY

Having found that the Union has engaged in certain unfair labor practices within the meaning of Section 8(b)(3) and (d) of the Act, it shall be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Los Angeles Local, American Federation of Television and Radio Artists, Los Angeles, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to execute the Dees side letter agreement submitted to it by the Employer on April 19, 1991.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Employer, execute forthwith the Dees side letter agreement reached by the parties and tendered by the Employer on April 19, 1991.

(b) Post at the Union's business offices and meeting places in Los Angeles, California, copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to Regional Director for Region 31 sufficient copies of the notice for posting by the Employer, if willing, at all places where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''